(1) Supreme Court, U.S.
FILED

011774 JUN - 5 2002

OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

STATE OF MARYLAND,
Petitioner,

v.

DWAYNE ANTHONY DRURY,
Respondent.

On Petition For Writ of Certiorari To The Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

GARY E. BAIR*
Assistant Attorney General

Office of the Attorney General
200 Saint Paul Place
Baltimore, Maryland 21202
(410) 576-6422

Counsel for Petitioner

**Counsel of Record*

87pgs

QUESTION PRESENTED

Whether displaying evidence of a crime to a suspect in police custody and informing the suspect that the evidence would be fingerprinted is the functional equivalent of interrogation under *Rhode Island v. Innis*, 446 U.S. 291 (1980).

PARTIES TO THE PROCEEDING

The caption contains the names of all the parties below.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED ... 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 5

I. The Court's Decision Below Misapplies This Court's Decision in *Innis*. 6

II. With This Case, The Court Can Address Several Issues Left Open in the Wake of *Innis* 11

III. There is a Serious Conflict in the Rulings of Federal and State Courts Considering Similar *Innis* Claims. 16

IV. Public Policy Concerns Require This Court to Reject the Maryland Court's Reading of *Innis*. 21

CONCLUSION 23

APPENDIX 1a

TABLE OF AUTHORITIES

Cases:

Arizona v. Mauro, 481 U.S. 520 (1987) ..... 8, passim

Arizona v. Roberson, 486 U.S. 675 (1988) .. 12, passim

Boykin v. Leapley, 28 F.3d 788 (8th Cir. 1994) 18

Commonwealth v. Rubio, 540 N.E.2d 189 (Mass. App.), *review denied*, 545 N.E.2d 43 (Mass. 1989) 20

Dancy v. United States, 745 A.2d 259 (D.C. 2000) 20

Dickerson v. United States, 530 U.S. 428 (2000) ... 21

Edwards v. Arizona, 451 U.S. 477 (1981) 15

Illinois v. Perkins, 496 U.S. 292 (1990) 10

In re Interest of Durand, 293 N.W.2d 383 (Neb. 1980) 20

Lewis v. State, 509 So. 2d 1236 (Fla. App.), *review denied*, 519 So. 2d 987 (Fla. 1987), *cert. denied*, 486 U.S. 1036 (1988) 17

Page

Miranda v. Arizona, 384 U.S. 436 (1966) . . . 3, passim

Nelson v. Fulcomer, 911 F.2d 928 (3d Cir. 1990) . . . 20

Pennsylvania v. Muniz, 496 U.S. 582 (1990) 10

People v. Ferro, 472 N.E.2d 13 (N.Y. 1984), *cert. denied*, 472 U.S. 1007 (1985) 19

Rhode Island v. Innis, 446 U.S. 291 (1980) . . . i, passim

Shedelbower v. Estelle, 885 F.2d 570 (9th Cir. 1989), *cert. denied*, 498 U.S. 1092 (1991) 19

State v. Flack, 860 P.2d 89 (Mont. 1993) 20

State v. Guayante, 663 P.2d 784 (Or. App.), *review denied*, 668 P.2d 384 (Or. 1983) 20

State v. Nixon, 599 A.2d 66 (Me. 1991) 19

State v. Reeves, 714 So. 2d 696 (La. 1998) 20

State v. Uganiza, 702 P.2d 1352 (Ha. 1985) 20

United States v. Allen, 247 F.3d 741 (8th Cir. 2001), *pet. for cert. filed* (U.S. Oct. 22, 2001) (No. 01-7310) 18

Page

United States v. Bennett, 626 F.2d 1309 (5th Cir. 1980), *cert. denied*, 449 U.S. 1092 (1981) 19

United States v. Blackstone, 56 F.3d 1143 (9th Cir. 1995) 16, 17

United States v. Crisco, 725 F.2d 1228 (9th Cir.), *cert. denied*, 466 U.S. 977 (1984) 22

United States v. Guido, 704 F.2d 675 (2d Cir. 1983) 19

United States v. Payne, 954 F.2d 199 (4th Cir.), *cert. denied*, 503 U.S. 988 (1992) 17, 18, 22

United States v. Taylor, 985 F.2d 3 (1st Cir.), *cert. denied*, 508 U.S. 944 (1993) 18

United States v. Walker, 624 F. Supp. 103 (D. Md. 1985) 20

Weathers v. State, 772 P.2d 1294 (Nev. 1989) 20

Constitutional Provisions:

United States Constitution:

Fifth Amendment 2, 5

Fourteenth Amendment 2

Page

Statute:

28 U.S.C. § 1257 1

Rule:

Rules of the Supreme Court

Rule 13 1

Miscellaneous:

Wayne R. LaFave, Jerold H. Israel & Nancy J. King, *Criminal Procedure* (1999) 12, 13

Alexander S. Helderman, *Revisiting* Rhode Island v. Innis: *Offering a New Interpretation of the Interrogation Test*, 33 Creighton L. Rev. 729 (2000) 13, 14

Jonathan L. Marks, *Confusing the Fifth Amendment with the Sixth: Lower Court Misapplication of the* Innis *Definition of Interrogation*, 87 Mich. L. Rev. 1073 (1989) .. 13, 15

Welsh S. White, *Interrogation Without Questions*: Rhode Island v. Innis *And* United States v. Henry, 78 Mich. L. Rev. 1209 (1980) 12

Petitioner, the State of Maryland, respectfully requests that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland.

OPINIONS BELOW

The reported opinion of the Court of Appeals of Maryland, *Drury v. State*, 368 Md. 331, 793 A.2d 567 (2002), reversing the judgment of the Court of Special Appeals of Maryland, is reproduced in Appendix A. (App. 1a-25a).

The unreported opinion of the Court of Special Appeals of Maryland, *Drury v. State*, No. 75, September Term, 1998, affirming the judgment of the Circuit Court for Queen Anne's County, Maryland, is reproduced in Appendix B. (App. 26a-43a).

The unreported proceedings and ruling of the Circuit Court for Queen Anne's County, *State v. Drury*, Criminal No. 4709, denying Drury's motion to suppress evidence, is reproduced in Appendix C. (App. 44a-54a).

STATEMENT OF JURISDICTION

The decision of the Court of Appeals of Maryland reversing Drury's convictions was filed on March 8, 2002. This petition is filed within 90 days of issuance of the opinion of the Court of Appeals of Maryland, as required by Rule 13 of the Rules of the Supreme Court. Therefore, jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV:

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

While investigating a break-in at the Hillside Market in Centreville, Maryland, that occurred on July 14, 1996,

Corporal Mark Whaley of the Centreville Police Department determined that a tire iron possibly was used to pry open the rear door of the store. (App. 2a, 46a). The officer also learned that several "adult" magazines had been taken from the market, along with cartons of cigarettes, bottles of liquor, and lottery tickets. (App. 2a-3a, 46a). After finding a trash bag containing some discarded magazines and a malt liquor bottle, and doing further investigation, Whaley focused his attention on Respondent Dwayne Anthony Drury as a prime suspect. (App. 3a, 28a, 47a).

Officer Whaley went to Drury's home on July 15, 1996, and transported him to police headquarters to question him about the burglary. (App. 3a, 14a, 28a, 47a). Drury was not handcuffed at the police station. (App. 50a). Before beginning the interrogation, Whaley placed the tire iron found at the crime scene and the plastic trash bag containing adult magazines on his desk. (App. 4a, 49a). Whaley then told Drury that he was going to send the evidence off for fingerprinting. (App. 4a, 49a).

At that time, and before Whaley gave Drury his *Miranda*[1] warnings or began questioning him, Drury volunteered three pieces of information about the items before him. (App. 47a-49a). First, as the officer recounted, "Mr. Drury proceeded to tell me the contents of the bag prior to me even stating what was in the bag myself." (App. 47a). Second, Drury told Whaley "that he had touched the magazines that were in that bag," both the opened and unopened ones. (App. 47a-48a). Finally, with respect to the tire iron, Drury said "my fingerprints could

---

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

be on that and are on hundreds of tire irons around Centreville." (App. 47a).

Officer Whaley then advised Drury of his *Miranda* rights. Drury invoked his right to silence, which Officer Whaley honored. (App. 4a, 48a-49a). Drury was not arrested at that time, and was permitted to leave. (App. 24a). He was arrested eleven days later, after additional investigation. (App. 24a).

Based on the above facts, Drury was indicted by the Grand Jury for Queen Anne's County on charges of second degree burglary, fourth degree burglary, and theft over $300.00. (App. 2a). He filed a motion to suppress the oral statements he made to Officer Whaley, arguing that he had been interrogated in violation of his *Miranda* rights. (App. 2a). Based on the officer's uncontroverted testimony, the suppression court rejected Drury's argument that he had been interrogated in violation of *Miranda*. (App. 53a).

Following trial and conviction, Drury appealed to the Court of Special Appeals of Maryland. (App. 26a-27a). Maryland's intermediate appellate court affirmed Drury's convictions, rejecting his argument that the officer violated his *Miranda* rights. (App. 31a-40a).

On certiorari review, the Court of Appeals of Maryland reversed, finding the officer's actions to be the functional equivalent of interrogation and violative of *Miranda*. (App. 1a-13a). Focusing on Corporal Whaley's subjective intent, the majority stated: "The only plausible explanation for the officer's conduct is that he expected to elicit a statement from [Drury]." (App. 8a).

Judge Battaglia, joined by Judge Cathell, dissented. (App. 14a-25a). These two judges believed "the majority stretches the holding of *Innis*" to find that having a suspect

view physical evidence is tantamount to interrogation. (App. 25a). The dissent read the majority opinion to the effect that "being taken to the police station *itself* could be sufficient to trigger the administration of *Miranda* warnings," because it "creates an environment which is instantaneously infused with coercive and compelling elements for a suspect." (App. 17a). According to the dissent: "It is not improper to confront a suspect with the factual or physical evidence of his or her allegedly criminal act." (App. 23a).

REASONS FOR GRANTING THE WRIT

Review by this Court of the decision of the Court of Appeals of Maryland is warranted for several reasons. First, as a practical matter, the court below has created a per se rule that any time a police officer shows a suspect evidence of a crime the gears of *Miranda* are engaged. This is inconsistent with *Rhode Island v. Innis*, 446 U.S. 291 (1980), and other cases of this Court interpreting "compulsion" under *Miranda* and the Fifth Amendment. Brief police-citizen encounters, where the suspect is not subjected to compelling influences, psychological ploys, or direct questioning, should not be construed as "interrogation" under *Miranda*.

Second, because of some ambiguity in the *Innis* test and the paucity of subsequent decisions by this Court, several open questions in the wake of *Innis* need to be addressed. With this case, the Court can refine the contours of what constitutes compulsion under the Fifth Amendment by further explicating the "functional equivalent" definition of *Innis*.

Third, as illustrated by the present case and numerous

other decisions, the lower courts have reached conflicting results when faced with similar *Innis* claims. In cases involving the display of evidence to a suspect or the discussion of such evidence, the state and federal courts have interpreted *Innis* quite differently and have reached diametrically opposed results.

Finally, there are unfortunate public policy ramifications to the Maryland court's interpretation of *Innis*. Every day, hundreds if not thousands of times, police officers discuss or show evidence to suspects under a myriad of circumstances. Merely informing a suspect about the evidence against him, which is what occurred here, may contribute to the suspect's intelligent exercise of his judgment concerning his future actions. Under the opinion below, this option is no longer available to the suspect.

I. The Court's Decision Below Misapplies This Court's Decision in *Innis*.

When this Court decided *Miranda* in 1966, it ruled that the now familiar warnings must precede in-custody interrogation in order to safeguard the Fifth Amendment privilege against compelled self-incrimination. 384 U.S. at 444. In the aftermath of the decision, one issue involved what police conduct constitutes "interrogation." In one passage in *Miranda*, the Court suggested that interrogation referred only to actual "questioning initiated by law enforcement officers." *Id.* Fourteen years after *Miranda*, however, the Court construed "interrogation" more broadly than in the above-quoted passage.

In *Rhode Island v. Innis*, the Court was confronted with the following scenario. Five days after a Providence taxi

driver had been murdered by a shotgun blast to the back of his head, a second cab driver reported that he had been robbed by a man wielding a sawed-off shotgun. 446 U.S. at 293. At police headquarters, the robbery victim identified a photograph of Innis as the perpetrator. Within a few hours, the police arrested Innis on the street and advised him of his *Miranda* rights. *Id.* at 293-94. Innis invoked his *Miranda* right to counsel and the officers who were to accompany Innis to the police station were instructed not to interrogate him. *Id.* at 294.

Three officers drove in a police car with Innis to the police station. While en route, two of the officers began discussing the missing shotgun. One officer told the other that he frequented the area on patrol and that there was a school for handicapped children nearby. *Id.* He continued, "and God forbid one of them might find a weapon with shells and they might hurt themselves." *Id.* at 294-95. After hearing further discussion of the officers, Innis interrupted the conversation and told the police that he would inform them of the location of the gun. He led the officers to a nearby field and pointed out the location of the shotgun under some rocks by the side of the road. *Id.* at 295.

This Court examined what it meant by the term "interrogation" in *Miranda*. First, the Court determined that the term was broader than questioning initiated by law enforcement officers, as had been suggested in the *Miranda* opinion. *Id.* at 299. Rather, *Miranda* applies "whenever a person in custody is subjected to either express questioning or its functional equivalent." *Id.* at 300-01. The Court concluded that "the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of

the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 301.

The Court reasoned that Innis was not "interrogated" within the meaning of *Miranda*. Innis was not expressly questioned by any of the officers. Nor was he subjected to the "functional equivalent" of questioning, as the officers should not "have known that their conversation was reasonably likely to elicit an incriminating response from [Innis]." *Id.* at 302. There was no evidence that the officers were aware that Innis was "peculiarly susceptible to an appeal to his conscience" or that he was "unusually disoriented or upset at the time of his arrest." *Id.* at 302-03.

The Court also found it important that the conversation was brief. "This is not a case where the police carried on a lengthy harangue in the presence of the suspect." *Id.* at 303. As the Court concluded: "It is our view, therefore, that [Innis] was not subjected by the police to words or actions that the police should have known were reasonably likely to elicit an incriminating response from him." *Id.*

Finally, and of particular significance to the present case, the Court held that subtle compulsion did not constitute interrogation. *Id.* The Court acknowledged that it was "readily apparent" that the officers' conversation "struck a responsive chord" with Innis and that this subjected him to "subtle compulsion," but this did not establish that Innis had been subjected to the functional equivalent of interrogation. *Id.*

Seven years after *Innis*, the Court revisited the issue in *Arizona v. Mauro*, 481 U.S. 520 (1987). There, Mauro was arrested for his son's murder after freely admitting to

the crime and taking the police to the child's body. *Id.* at 521. After being taken to the police station and advised of his *Miranda* rights, Mauro told the officers that he did not wish to make any more statements without having a lawyer present. *Id.* at 522. At the same time, an officer was questioning Mauro's wife, who asked to speak with Mauro. *Id.*

The police permitted Mrs. Mauro to speak with her husband, but only in the presence of an officer. Not only did the officer listen to the conversation, he also placed a tape recorder in plain sight on a desk and recorded the conversation. *Id.* During the brief discussion, the wife expressed despair about the situation and the husband told Mrs. Mauro not to answer any questions until a lawyer was present. *Id.* The prosecution used the tape recording of the conversation to rebut Mauro's claim at trial that he was insane at the time of the crime. *Id.* at 523.

After reviewing its holding in *Innis*, the Court concluded that Mauro had not been interrogated by the police. First, the officer asked Mauro no questions about the crime or his conduct. *Id.* at 527. Nor was the officer's decision to allow Mauro's wife to see him "the kind of psychological ploy that properly could be treated as the functional equivalent of interrogation." *Id.* The Court held: "Mauro was not subjected to compelling influences, psychological ploys, or direct questioning. Thus, his volunteered statements cannot properly be considered the result of police interrogation." *Id.* at 529.

Taken together, *Innis* and *Mauro* stand for the proposition that brief police-suspect encounters, where no questioning takes place, generally will not be tantamount to interrogation. It is not enough that a particular encounter might be a form of subtle compulsion. Nor is it

sufficient that the suspect volunteers statements during such an encounter. Rather, the suspect must be subjected to a situation where he is reasonably likely to make an incriminating response, judged from the perspective of the suspect rather than the intent of the police. *Innis,* 446 U.S. at 301; *Mauro*, 481 U.S. at 526-27. *See also Pennsylvania v. Muniz*, 496 U.S. 582, 601 (1990) ("the *Innis* test focuses primarily upon 'the perspective of the suspect'"); *Illinois v. Perkins*, 496 U.S. 292, 296 (1990) ("Coercion is determined from the perspective of the suspect.").

Notwithstanding the clear import of the Court's reasoning in *Innis* (and without mention of *Mauro*), the Court of Appeals of Maryland concluded that Officer Whaley's presentation and discussion of evidence was the functional equivalent of interrogation. First, the state court acknowledged "that, although [Drury] was in custody, he was not subjected to express interrogation. The officer did not ask [him] questions, but rather made a statement to him and displayed the tire iron and magazines." (App. 8a).[2] The lower court found significant that Drury "had been brought to the police station for the express purpose of questioning." (App. 8a). In light of this, the court concluded: "The only plausible explanation for the officer's conduct is that he expected to elicit a statement from [Drury]." (App. 8a). Having determined that the police actions were "reasonably likely to evoke an incriminating response from him," (App. 8a), the court

---

[2]The State of Maryland conceded below, and does not contest here, that Drury was in custody for *Miranda* purposes when Officer Whaley brought him to the stationhouse.

held that the absence of *Miranda* warnings required the suppression of Drury's statements. (App. 13a).

This conclusion appears to be inconsistent with *Innis* and *Mauro*: the encounter was brief and free from coercive indicia; Drury was not handcuffed; was not under arrest; and was not detained after making his remarks about the evidence he had seen. As in *Innis*, there was no evidence that the officer knew that Drury might be "peculiarly susceptible to an appeal to his conscience" or that he was "unusually disoriented or upset at the time" he was brought to the police station. 446 U.S. at 302-03. As in *Innis*, there was no "lengthy harangue." *Id.* at 303. Thus, even if Drury was subjected to some type of "subtle compulsion," it did not rise to the level of interrogation. *Id.*

II. With This Case, The Court Can Address Several Issues Left Open in the Wake of *Innis*.

Although *Innis* served as a starting point for this Court's analysis of what constitutes "interrogation" under *Miranda*, several questions remain open, even some 22 years later. As discussed below, at least three questions have arisen since *Innis* was decided. First, there has been some confusion as to how the *Innis* test itself is to be applied. Some lower courts, like the majority in this case, have tended to emphasize the subjective intent of the police officer in their *Innis* analyses, while other courts have viewed the test from the more objective perspective of the suspect. Second, it remains an open question whether the same analysis applies regardless of whether the suspect makes a statement before being given *Miranda* warnings or after invoking his *Miranda* rights. Finally, it

is not clear how to interpret this Court's reference in *Arizona v. Roberson*, 486 U.S. 675, 687 (1988), that informing a suspect about the facts of a second investigation does not necessarily constitute interrogation.

This Court stated in *Innis* that the definition of interrogation "focuses primarily upon the perceptions of the suspect, rather than the intent of the police." 446 U.S. at 301. The Court also noted, however, "[t]his is not to say that the intent of the police is irrelevant, for it may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response." *Id.* n.7. This somewhat ambiguous language has led to confusion in the lower courts.

The commentators have recognized the difficulty courts have had in applying the *Innis* test. One leading authority states: "As for what *Innis* does mean, this is a matter of some uncertainty. . . ." 2 Wayne R. LaFave, Jerold H. Israel & Nancy J. King, *Criminal Procedure* § 6.7(a) at 544 (1999). LaFave also refers to another commentator's "alternative interpretation of *Innis* which more closely fits both the majority's result and its analysis," *id.*, namely:

> In order to preserve both the majority's objective approach and a close correlation between the officer's purpose and the "reasonably likely" standard, the best reading of the *Innis* test is that it turns upon the *objective* purpose *manifested* by the police.

Id., *quoting* Welsh S. White, *Interrogation Without Questions:* Rhode Island v. Innis *And* United States v. Henry, 78 Mich. L. Rev. 1209, 1231 (1980). LaFave believes the White reformulated test is consistent with the

result of *Innis*, is easy to apply, and is fully responsive to *Miranda* concerns. LaFave, *supra*, at 544-45.

Another commentator states: "*Innis*' 'reasonably likely to elicit' test is ambiguous on its face and is made even more confused by a result that the dissenters charged, with some reason, 'verges on the ludicrous.'" Jonathan L. Marks, *Confusing the Fifth Amendment with the Sixth: Lower Court Misapplication of the* Innis *Definition of Interrogation*, 87 Mich. L. Rev. 1073, 1084 (1989), *quoting Innis*, 446 U.S. at 306 (Marshall, J., dissenting). This article goes on to describe three interpretations of *Innis*: the "objective observer" test proposed by Professor White; the attempt of dissenting Justice Stevens to square the result in *Innis* with the articulated test; and an interpretation advanced by Professor Yale Kamisar "focusing on the compelling nature of the practice and not on the probability of its success." *Id.* at 1084-87.

Finally, a recent article extensively reviewed lower federal court decisions and found that the circuits have had extreme difficulty applying the *Innis* test. *See* Alexander S. Helderman, *Revisiting* Rhode Island v. Innis*: Offering a New Interpretation of the Interrogation Test*, 33 Creighton L. Rev. 729, 738-45 (2000). Finding little consistency, and noting that several circuits and states interpret the *Innis* test in more than one way, this commentator categorizes the decisions four ways: (1) an objective test;[3] (2) an objective test that also examines the

---

[3]The author includes in this category decisions of the First, Seventh, and Tenth Circuits as well as cases from Maine, Nebraska, New Hampshire, Washington, and Wisconsin. *Id.* at 739 & nn. 78-80.

officer's intent;[4] (3) a subjective test focusing on the suspect's perspective;[5] and (4) a "mixed" test combining both an objective and subjective inquiry.[6] *Id.* at 738-39.

A second question remaining open after *Innis* is the matter of whether the same analysis applies to both first and second level *Miranda* protections. Stated otherwise, should the *Innis* definition of interrogation be the same when a suspect makes a statement prior to being given *Miranda* warnings (first level) and after a suspect has invoked his right to counsel or silence (second level)? In both *Innis* and *Mauro*, the suspects had been given *Miranda* warnings and had invoked their right to counsel. In the present case, by contrast, Drury was in police custody, but had not yet been given *Miranda* warnings when he was shown evidence of the burglary and made a statement. This case thus presents an opportunity for this Court to identify and explain any difference in analysis

---

[4]In this category are cases from the Ninth, Tenth, Eleventh, and District of Columbia Circuits, and state decisions of Connecticut, Florida, Massachusetts, and North Carolina. *Id.* at 740-41 & nn. 87-90.

[5]Decisions are cited from the Fourth, Sixth, Eighth, Ninth, and Eleventh Circuits, and from Alabama, California, Colorado, Illinois, Kentucky, Minnesota, Nevada, Ohio, and Vermont. *Id.* at 742 & nn. 96-100.

[6]Cases in this category are from the Third, Fifth, Sixth, and Ninth Circuits, and from the States of Arizona, Delaware, Maryland, Massachusetts, and Nevada. *Id.* at 743-44 & nn. 102-07.

between the two situations.[7]

A final issue yet to be addressed by this Court is the significance of the dicta concerning *Innis* in *Arizona v. Roberson*. In *Roberson*, the Court extended the rule of *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981), and held that in the context of the investigation of an unrelated crime, a suspect who has invoked his *Miranda* right to counsel cannot be forced to undergo police initiated interrogation. 486 U.S. at 687. The Court went on to discuss an argument made by the United States, as amicus curiae, that a suspect in custody might want "to learn from the police what the new investigation is about so that he can decide whether it is in his interest to make a statement about that matter without the assistance of counsel." *Id.* Citing *Innis*, Justice Stevens, writing for the Court, suggested that even if the police did not provide counsel as required under *Edwards*, the officers "are free to inform the suspect of the facts of the second investigation as long as such communication does not constitute interrogation." *Id.*

---

[7]Some commentators have argued that the analysis of such a first level protection should focus on whether the officer interrogated the suspect, whereas the issue under the second level should be whether the police "scrupulously honored" the invoked right. Marks, *supra*, 87 Mich. L. Rev. at 1114 & n. 255 (citing Kamisar's critique of failure to recognize distinction). As Marks states: "In *Mauro*, the Supreme Court blurred this distinction by finding that the police do scrupulously honor the rights of the suspect when they do not engage in interrogation." *Id.* at 1114.

This passage prompts two questions: (1) Under what circumstances will conveying information about an investigation rise to the level of interrogation?; and (2) What difference, if any, is there between telling a suspect in custody about the matter for which he is in custody as opposed to telling him about an unrelated matter? As to the first question, one reading of the *Roberson* language is that the mere conveyance of facts to the suspect would *not* be tantamount to interrogation, but how much more can police do before crossing the *Innis* line? This case presents the opportunity to answer these questions.

III. There is a Serious Conflict in the Rulings of Federal and State Courts Considering Similar *Innis* Claims.

The issue before the Court is a frequently recurring one. Many courts have addressed the *Innis* interrogation issue in cases similar to Drury's, where a suspect either was shown or was informed of evidence of a crime. Faced with either scenario, some courts have ruled that such physical or verbal displays are not the functional equivalent of interrogation. Others have come to the opposite conclusion.

In a case like the present one, an Arizona officer arrested a person on drug charges and took him to a nearby Motor Vehicle Department. *United States v. Blackstone*, 56 F.3d 1143, 1144 (9th Cir. 1995). Upon searching the arrestee's truck, the officer discovered a handgun and other evidence. The officer "packed his discoveries into a paper bag" and took Blackstone from the MVD to his own office. *Id.* Then, without reading Blackstone his *Miranda* rights, the officer began to empty the bag in front of the

handcuffed Blackstone. As soon as the officer removed the gun, Blackstone blurted out, "I was afraid you'd find that." *Id.* Relying upon *Innis*, the Court of Appeals for the Ninth Circuit came to a conclusion very different from the Court of Appeals of Maryland in this case, giving short shrift to Blackstone's argument that the officer's actions constituted "interrogation." *Id.* at 1146-47.

A Florida decision also illustrates a similar view that showing a suspect evidence of a crime is not tantamount to interrogation. In *Lewis v. State*, 509 So. 2d 1236 (Fla. App.), *review denied*, 519 So. 2d 987 (Fla. 1987), *cert. denied*, 486 U.S. 1036 (1988), a robbery suspect was shown a videotape of the robbery. While being shown the tape, Lewis said: "Man, he took it like a man. I should have hit him a couple more times." *Id.* at 1236. The Florida court, referencing *Innis* and *Mauro*, found that the statement was spontaneous and volunteered, not in response to interrogation. *Id.* at 1237.

Numerous federal courts have ruled on the "interrogation" issue when police officers have discussed evidence they have against a suspect, as opposed to showing the evidence to the suspect. Although not a visual display, this type of police conduct orally conveys the same information to a suspect in custody and has been challenged as the functional equivalent of interrogation.

United States v. Payne, 954 F.2d 199 (4th Cir.), *cert. denied,* 503 U.S. 988 (1992), typifies this line of cases. In *Payne*, the defendant was arrested after selling cocaine to an undercover FBI agent on two occasions. *Id.* at 200-01. While being transported from Hyattsville to Baltimore in the company of three FBI agents, one of the agents received information on a cell phone that a gun had been found at Payne's residence. *Id.* at 201. The agent then

said to Payne, "They found a gun at your house," to which Payne responded, "I just had it for my protection." *Id.* Payne moved to suppress his statement on *Innis* grounds. *Id.* In ruling that Payne was not "interrogated," the Fourth Circuit noted that there were "indications" from the Court in *Roberson* "that mere declaratory descriptions of incriminating evidence do not invariably constitute interrogation for *Miranda* purposes." *Id.* at 202.

Another case similar to Drury's is that of *Boykin v. Leapley*, 28 F.3d 788 (8th Cir. 1994). Boykin, having been strip-searched, complained to a deputy that the police had taken his shoes. *Id.* at 791. The deputy told Boykin that the police had probably taken the shoes "in order to make casts or to take pictures of the shoes in case they had a print at the crime scene matching his tennis shoes." *Id.* According to the deputy, Boykin "bowed his head a little bit and he said, 'Yeah, maybe they do.'" *Id.* Boykin argued "that the deputy's behavior amounted to a subtle form of police coercion that must be considered an interrogation." *Id.* at 792. The Eighth Circuit ruled that the circumstances of the conversation did not support the conclusion that Boykin considered himself under interrogation because he was not "subjected to compelling influences, psychological ploys, or direct questioning." *Id.* (quoting *Mauro*, 481 U.S. at 529).

In addition to *Payne* and *Boykin,* numerous other federal courts have spoken on this issue, and have concluded that telling a defendant about the evidence against him is not the functional equivalent of interrogation under *Innis*. *See, e.g., United States v. Allen*, 247 F.3d 741, 765-66 (8th Cir. 2001), *pet. for cert. filed* (U.S. Oct. 22, 2001) (No. 01-7310); *United States v. Taylor,* 985 F.2d 3, 6-8 (1st Cir.), *cert. denied*, 508 U.S.

944 (1993); *Shedelbower v. Estelle*, 885 F.2d 570, 571-73 (9th Cir. 1989), *cert. denied*, 498 U.S. 1092 (1991); *United States v. Guido*, 704 F.2d 675, 676-77 (2d Cir. 1983); *United States v. Bennett*, 626 F.2d 1309, 1310-13 (5th Cir. 1980), *cert. denied*, 449 U.S. 1092 (1981).

In direct opposition, other courts have ruled on similar facts that such police conduct *is* the functional equivalent of interrogation under *Innis*. In a case relied upon by the Maryland court below, a defendant was arrested for murder during the course of a robbery in which some furs were stolen. *People v. Ferro*, 472 N.E.2d 13 (N.Y. 1984), *cert. denied*, 472 U.S. 1007 (1985). Ferro was placed in a cell and the police positioned the stolen furs on the floor outside. *Id.* at 14-15. On these facts, the New York Court of Appeals found that placing the furs in the suspect's view was reasonably likely to elicit an incriminating response. *Id.* at 17.

Other courts have also ruled that showing evidence to a suspect or discussing such evidence of a crime is tantamount to interrogation. In one case, for example, officers placed several items on a table at the stationhouse within view of the suspect, who had been taken into custody on suspicion of murder. *State v. Nixon*, 599 A.2d 66, 66-67 (Me. 1991). One of the items was a sketch of the crime scene showing the position of the victim's body. After seeing Nixon "peering at the diagram," the detective pushed it towards him and said, "You might find this interesting." *Id.* at 67. The suspect then said, "I'll tell you one thing, he wasn't there, he was over there." *Id.* On these facts, the Supreme Judicial Court of Maine found the suspect had been interrogated. *Id.*

A case from Hawaii illustrates a similar view of *Innis*. While in custody on a burglary charge, Romeo Uganiza

told the cellblock turnkey that he did not wish to talk with the police. *State v. Uganiza*, 702 P.2d 1352, 1353 (Ha. 1985). Nonetheless, an officer came to the cell and showed Uganiza written statements of several witnesses and told him how the statements implicated him in the crime. *Id.* The arrestee then stated that he wished to explain what happened. *Id.* The Hawaii court ruled that the officer should have known that presenting this evidence was reasonably likely to elicit a response from Uganiza. *Id.* at 1355.

Other decisions are consistent with the above cases in holding that confronting a suspect with evidence of a crime is tantamount to interrogation. *See, e.g., Nelson v. Fulcomer*, 911 F.2d 928, 934 (3d Cir. 1990) (confronting suspect with alleged partner and informing him partner had confessed); *United States v. Walker*, 624 F. Supp. 103, 105 (D. Md. 1985) (showing incriminating document ten minutes after invoking *Miranda* rights); *Dancy v. United States*, 745 A.2d 259, 272-73 (D.C. 2000) (telling suspect in hospital about murder investigation and his involvement); *State v. Reeves,* 714 So. 2d 696, 696 (La. 1998) (handing arrest report, warrant, and affidavit listing evidence); *Commonwealth v. Rubio*, 540 N.E.2d 189, 193-94 (Mass. App.) (showing arrestee search warrant and cocaine seized), *review denied*, 545 N.E.2d 43 (Mass. 1989); *State v. Flack,* 860 P.2d 89, 91-93 (Mont. 1993) (five to ten minute discussion of evidence against suspect); *In re Interest of Durand*, 293 N.W.2d 383, 385-87 (Neb. 1980) (showing police reports to juvenile); *Weathers v. State*, 772 P.2d 1294, 1296-97 (Nev. 1989) (telling suspect he was under investigation and that witness had seen him near crime scene); *State v. Guayante*, 663 P.2d 784, 787 (Or. App.) (showing defendant food stamps stolen in

robbery and saying, "Look, we already know you did it. Here is the stuff you took from him."), *review denied*, 668 P.2d 384 (Or. 1983).

As the above cases illustrate, a major conflict exists in the lower courts, and this Court's guidance is needed. This Court should take this opportunity to resolve this conflict and delineate a clear line with respect to whether police "interrogate" suspects when they present or discuss evidence of the crime with a suspect in custody.

IV. Public Policy Concerns Require This Court to Reject the Maryland Court's Reading of *Innis*.

As this Court recently acknowledged: "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture." *Dickerson v. United States*, 530 U.S. 428, 443 (2000). In the same case, however, the Court noted a disadvantage of the rule, namely that statements that are "by no means involuntary" may be excluded nonetheless "and a guilty defendant go free as a result." *Id.* at 444. In this case, Drury should not go free, because neither the spirit nor the rationale of *Miranda* was violated.

The Court has made clear that police have leeway in determining how to deal with suspects and that some limited forms of "subtle compulsion" are permitted. *Innis*, 446 U.S. at 303. It is only when an officer takes advantage of a particularly susceptible person or subjects a person to extended, coercive treatment that the line is crossed. Only then might a course of action be tantamount to interrogation even though no questions are asked.

Here that line was not crossed. The brief encounter, free of coercive tactics, did not engage the gears of

Miranda. Yet the Maryland court found to the contrary. Holdings such as this one diminish the ability of law enforcement to use legitimate investigative tools. If suspects volunteer statements during such encounters, the statements should not be barred from courtroom use.

Moreover, permitting the police to share information freely with suspects works to the advantage of the person under suspicion. Both the Fourth and Ninth Circuits have noted that it may be in the interest of the suspect to be kept informed about the evidence against him. *See Payne*, 954 F.2d at 202; *United States v. Crisco*, 725 F.2d 1228, 1232 (9th Cir.), *cert. denied*, 466 U.S. 977 (1984). Giving a suspect notice of what evidence the police have in their possession provides the suspect with crucial information. Armed with that information, the suspect may make a more informed and intelligent decision on what course of conduct to follow. Perhaps the suspect will want to "stonewall" or, perhaps, to "come clean." In either event, knowledge about the police case can only be helpful to the suspect.

To serve these dual policies, which aid both the police and the suspect, *Innis* should not be construed to prevent the police from telling a suspect about evidence in their possession or showing it to him. The decision by the Court of Appeals of Maryland, and those in agreement with it, undermine both of these interests, and this Court should grant the petition to address this matter. By so doing, this Court can refine its decision in *Innis*, clarify the scope of interrogation under *Miranda*, and help draw a brighter line for officers and courts to follow.

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that this Court issue a writ of certiorari to review the judgment of the Court of Appeals of Maryland.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

GARY E. BAIR*
Assistant Attorney General

Counsel for Petitioner

**Counsel of Record*

June 3, 2002